

# Supreme Court of the United States

October Term, 1976

No. 76-577

HUGO ZACCHINI,  
*Petitioner,*

vs.

SCRIPPS-HOWARD BROADCASTING COMPANY,  
*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE OHIO SUPREME COURT

## PETITIONER'S REPLY BRIEF

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In respondent's counterstatement of the case certain "facts" are recited which, petitioner submits are not supported by the record and the reliability of which may be quite pertinent to consideration of this proceeding.

Respondent represents that "Petitioner's act had generated substantial interest at the [Geauga County] fair." That statement derives from an affidavit in support of defendant's motion for summary judgment (App. p. 55). A fair reading of the affidavit indicates that what is presented as fact is rather the affiant's opinion as to the impact of the petitioner's performance. One man's opinion as to whether the general public was or was not substantially interested in petitioner's performance should not end the inquiry.

Similarly, respondent states that its appropriation of petitioner's act was "in keeping with Respondent's commitment to present a broad range of news and information to the public," and "would call the public's attention to the fair's attractions by informing its viewers of a special feature." Petitioner submits that there is nothing in the record which supports these noble assertions as to respondent's motivation.

Respondent has advanced four arguments in opposition to granting of the writ.

Petitioner is at a loss to understand respondent's first argument, that this action does not involve an important question of federal constitutional dimensions. The decision of the Ohio Supreme Court does not, as respondent suggests, merely involve issues of state law. There simply can be no denial that the dismissal of petitioner's action is predicated upon the Ohio Supreme Court's view of the extent of the immunity granted to the media under the First Amendment to the United States Constitution. The decision of the Ohio Supreme Court, sustaining respondent's claim of immunity, clearly involves a "right, privilege or immunity" "specially set up or claimed under the [United States] Constitution." 28 U.S.C. §1257(c).

Respondent's second argument is related to the first, in that it also proceeds from the premise that the questions resolved by the Ohio Supreme Court were all essentially issues of state law. The opinion of the Ohio Supreme Court speaks for itself, and petitioner can only urge that a full and fair reading of the opinion negates any such conclusion. While respondent's exposure to liability was a matter of state law, its immunity from any award of damages was plainly based upon federal constitutional grounds.

Respondent's third argument goes to the merits of petitioner's application for review. There is no point in

belaboring this aspect of the proceeding. Petitioner would, however, reiterate that the qualifications to the rule of immunity announced by the Ohio Supreme Court, to which respondent points as providing "more than adequate protection of serious abuses of a performer's rights," are in actuality meaningless (See, petitioner's brief pp. 12-13).

Finally, respondent argues that this case is a matter of *de minimis*, presenting no special or important reasons for review. In conjunction therewith respondent also appears to suggest that review should be denied because of the novel nature of the facts of this action.

Petitioner would reply that an erroneous ruling by a state supreme court on a First Amendment question of first impression cannot be passed off as *de minimis*. No matter how unique might be the facts which provide the foundation for the ruling, if the rule of constitutional law as adopted is of broad application such decision is a proper vehicle for review.

This action represents a case in which the Ohio Supreme Court has extended a First Amendment privilege beyond boundaries either necessary or proper, and certiorari should be granted to review that holding.

Respectfully submitted,

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